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March 7, 2023

VIA ECF W/ COURTESY COPY VIA FIRST CLASS MAIL

Hon. Taryn A. Merkl
United States Magistrate Judge
United States District Court for the
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Hon. Nicholas G. Garaufis
United States District Judge

Re: United States ex rel. YNKDY-2 v. Shiel Medical Laboratory, et al.
Civil Action No. 16-CV-1090-NGG-TAM

Dear Magistrate Judge Merkl:

This firm is co-counsel for Defendant Jack Basch (“Basch”), a named defendant in the above-referenced matter. We write jointly on behalf of defendants Basch, Shiel Medical Laboratory (“Shiel”) and BIM Medical, Inc. (“BIM”, and together with Basch and Shiel, collectively the “Basch/Shiel Defendants”) in response to Your Honor’s Order of February 22, 2023 (“February 22, 2023 Order”), directing the parties to file a joint status report by March 8, 2023 “advising the Court of anticipated next steps in light of the parties failure to schedule a pre motion conference before the Hon. Nicholas G. Garaufis and Plaintiffs failure to resubmit their summonses.” This submission is made only on behalf of the Basch/Shiel Defendants¹ because, as is set forth in greater detail below, Relator’s counsel did not respond to the Basch/Shiel Defendants’ counsel’s requests to coordinate a joint response on behalf of all parties.

By way of background, this matter was filed under seal in March 2016 pursuant to the *qui tam* provisions of the federal False Claims Act, 31 U.S.C. § 3729 *et seq.* (the “FCA”) and certain state-based FCA analogues and other laws alleging, *inter alia*, that Defendants knowingly

¹ Though defendants Fresenius Medical Care and Shiel Holdings, LLC appear to have been served in this matter, *see* Civil Docket for Case No. 1:16-cv-01090-NGG-TAM (“Docket”), Entry Nos. 36 and 37, neither one has appeared yet, and counsel for the Basch/Shiel Defendants do not know who (if anyone) will be representing those defendants in this matter.

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submitted claims for reimbursement for laboratory tests that were not reasonable or necessary or that were furnished pursuant to improper referrals and kickbacks. *See Docket, Entry No. 9.* On June 14, 2022, the United States of America and the States of New York, New Jersey, and Connecticut each respectively filed notices of intent to decline intervention pursuant to 31 U.S.C. § 3730(b)(4)(B), after which this Court unsealed the pleadings and directed relator to effect service upon defendants if it intended to proceed with this matter absent government intervention. *See Docket, Entry Nos. 24-28.* Relator thereafter signaled its intention to maintain the instant action on its own pursuant to 31 U.S.C. § 3730(b)(1) by effecting service on multiple defendants in this action, including but not limited to Mr. Basch.

On October 20, 2022, defendants Basch, BIM Medical, Inc., and Shiel Medical Laboratory submitted pre-motion conference requests pursuant to Judge Garaufis' Individual Rule V(A)(2)(a) to address these Basch/Shiel Defendants' contemplated motions to dismiss Relator's Second Amended Complaint ("SAC") pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(2), 12(b)(6), 10(a), 8, and 9(b), and to request that the Court extend their time to respond to Relator's SAC to a date to be determined at the conference. Docket, Entry Nos. 52 and 54. The next day, October 22, 2022, Judge Garaufis issued an Order directing the parties to confer and contact the Court's deputy to schedule a pre-motion conference. In response, on October 27, 2022, the undersigned contacted Relator's counsel via email regarding scheduling, and over the following weeks, the parties engaged in back and forth regarding scheduling. The last communication between the parties regarding scheduling was on December 21, 2023, where, in response to Relator's counsel's request, counsel for co-defendants Shiel and BIM proposed January 4 and 5 for a meet and confer. Relator's counsel did not respond to that proposal. Around the same time, counsel for Mr. Basch requested that Relator's counsel include defendants Fresenius Medical Care and Shiel Holdings, LLC, in the communications. Relator's counsel did not reply.

On March 1, 2023 (following issuance of the Court's February 22, 2023 Order), we emailed Relator's counsel to suggest times (March 2nd and March 3rd) to meet and confer to coordinate a joint submission. Relator's counsel did not respond to those requests, but did, on March 3rd – more than four months after our request for a pre-motion conference – write to Judge Garaufis to request an unrelated pre-motion conference regarding a proposal to add new defendants. It is only because of Relator's counsel's non-responsiveness that the Basch/Shiel Defendants are constrained to file this submission solely on their behalf and not jointly as the Court directed.² At 5:18 pm yesterday, one of Relator's counsel emailed asking that we "be advised" that they are available this afternoon.

The Basch/Shiel Defendants remain intent on moving to dismiss Relator's SAC, and respectfully renew their requests that the Court schedule a pre-motion conference to discuss their

² At 5:18 pm yesterday, one of Relator's counsel emailed stating that the Basch/Shiel Defendants should "be advised" that they would be available this afternoon or evening without further specification. The e-mail did not copy or explain the absence of defendants Fresenius Medical Care or Shiel Holdings, LLC. We do not regard this last-minute communication as a serious attempt to schedule a pre-motion conference or engage in a meet and confer.

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contemplated motions to dismiss Relator's SAC pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(2), 12(b)(6), 10(a), 8, and 9(b), and that the Court continue to extend the Basch/Shiel Defendants' time to respond to the SAC to a date to be determined at the conference. The Basch/Shiel Defendants are prepared to move forward with a pre-motion conference regarding their proposed motion to dismiss on any of the following dates: March 21, 23, 24, 28, or April 20, 21 or 24.

We thank the Court for its consideration.

Respectfully,



Claude M. Millman

Cc: Counsel of record by ECF